

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LUIS G. CABRERA,	§
	§ No. 327, 2010
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 9703012700
	§
Plaintiff Below-	§
Appellee.	§

Submitted: July 20, 2010
Decided: August 19, 2010

Before **HOLLAND, BERGER** and **JACOBS**, Justices

ORDER

This 19th day of August 2010, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Luis G. Cabrera, filed an appeal from the Superior Court's May 13, 2010 order adopting the February 29, 2009 report of the Superior Court Commissioner, which recommended that Cabrera's third motion for postconviction relief pursuant to Superior Court Criminal Rule 61 be denied.¹ The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior Court's judgment on the ground that it is

¹ Del. Code Ann. tit. 10, §512(b); Super. Ct. Crim. R. 62.

manifest on the face of the opening brief that the appeal is without merit.²

We agree and affirm.

(2) In May 1998, Cabrera was found guilty by a Superior Court jury of Intentional Murder in the First Degree, Felony Murder in the First Degree, Conspiracy in the First Degree, and Burglary in the First Degree. The jury unanimously found that the State had proven beyond a reasonable doubt at least one of the statutory aggravating circumstances. During the penalty phase, 7 jurors recommended death and 5 jurors recommended life imprisonment. The Superior Court sentenced Cabrera to 2 consecutive terms of life imprisonment without benefit of probation, parole or any other sentence reduction, and to an additional total of 9 years at Level V. Cabrera's convictions were affirmed by this Court on direct appeal.³ The Superior Court's denial of his first postconviction motion also was affirmed by this Court.⁴

(3) In December 2005, Cabrera filed a second motion for postconviction relief. The ground for the motion was that this Court's decision in *Williams v. State*, 818 A.3d 906 (Del. 2003) required that his conviction of felony murder under Del. Code Ann. tit. 11, §636(a)(2) be

² Supr. Ct. R. 25(a).

³ *Cabrera v. State*, 747 A.2d 543 (Del. 2000).

⁴ *Cabrera v. State*, Del. Supr., No. 538, 2003, Holland, J. (Apr. 26, 2004).

vacated because there was no proof that the murder was committed “in furtherance of” the underlying burglary. Counsel was appointed to represent Cabrera. In August 2008, the Superior Court vacated Cabrera’s felony murder conviction following this Court’s decision in *Chao v. State*, 931 A.2d 1000 (Del. 2007), which held that *Williams* should be applied retroactively. No appeal was taken from the Superior Court’s decision.

(4) In this appeal from the Superior Court’s denial of his third motion for postconviction relief, Cabrera claims that a) his trial counsel provided ineffective assistance by failing to request jury instructions on the lesser-included offenses of Intentional Murder in the First Degree and on the credibility of accomplice testimony; b) the trial judge improperly failed to give such instructions *sua sponte*; and c) appointed counsel on his second postconviction motion provided ineffective assistance because he did not raise those claims.

(5) Before addressing the substantive merits of claims raised in a motion for postconviction relief, the Superior Court must first address the procedural requirements under Rule 61.⁵ In this case, Cabrera’s claims are clearly time-barred.⁶ In order to overcome the time bar, Cabrera must demonstrate a colorable claim of a miscarriage of justice that undermined

⁵ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁶ Super. Ct. Crim. R. 61(i)(1).

the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.⁷ With respect to Cabrera's first two claims, Cabrera provides no argument in support of a miscarriage of justice and we find no such support in the record before us. We, therefore, conclude that those claims are without merit.⁸ We also conclude that Cabrera's third claim is unavailing, since the right to the effective assistance of counsel is inapplicable in the context of postconviction proceedings.⁹

(6) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

⁷ Super. Ct. Crim. R. 61(i)(5).

⁸ Moreover, Cabrera's claim regarding a jury instruction on the credibility of accomplice testimony previously was decided by this Court on direct appeal. Supr. Ct. Crim. R. 61(i)(4).

⁹ *Coleman v. Thompson*, 501 U.S. 722, 755 (1991).